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In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1347

OVIDIO OMAR URDIALES,
Petitioner

versus

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD W. HARRIS
1517 Tower Life Building
San Antonio, Texas 78205

OSCAR C. GONZALEZ
200 Main Plaza
San Antonio, Texas 78205

Attorneys for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX

PAGE NO.

Opinions Below. 1

Jurisdiction. 2

Questions Presented. 2

Statutes Involved. 2

Statement of the Case. 2

Reasons for Granting the Writ
I. 5
II. 15

Conclusion. 19

Certificate of Service. 20

Appendix A: Opinion of the United States Court of Appeals for the Fifth Circuit of November 24, 1975. . . . . A-1

Appendix B: Order of the United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing of February 23, 1976. . . . . B-1

CITATIONS

PAGE NO.

CASES:

Boyd vs. United States (1892), 142 U.S. 450, 12 S.Ct. 292, 35 L.Ed. 1077 5

Cunha vs. Brewer (8th Cir., 1975) 511 F.2d 894 8

Michelson vs. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 5

United States vs. Chrzanowski (3rd Cir., 1974) 502 F.2d 573 7

United States vs. Cole (4th Cir., 1974) 491 F.2d 1276 .. 7

United States vs. Eatherton (1st Cir., 1975) 519 F.2d 603 8

United States vs. Fierson (7th Cir., 1969) 419 F.2d 1020 9

United States vs. Flick (7th Cir., 1975) 516 F.2d 489 7

United States vs. Franks (6th Cir., 1975) 511 F.2d 25 7

United States vs. Freeman (10th Cir., 1975) 514 F.2d 1184 7

United States vs. Goodwin (5th Cir., 1974) 492 F.2d 1141 9

BLEED THROUGH

CITATIONS (Continued)

PAGE NO.

United States vs. Grammer (9th Cir., 1975)
513 F.2d 673 7

United States vs. Moore (9th Cir., 1975)
522 F.2d 1068 14

United States vs. Papadakis (2nd Cir., 1975)
510 F.2d 287 7

United States vs. Ring (6th Cir., 1975)
513 F.2d 1001 9

United States vs. San Martin (5th Cir., 1974)
505 F.2d 918 8

United States vs. Scanland (5th Cir., 1974)
495 F.2d 1104 17

United States vs. Wiggins (C.A.D.C., 1975)
509 F.2d 454 7

MISCELLANEOUS:

McCormick, *Evidence,* 1954, p. 332 7

Speedy Trial Act of 1974, 18 USC § 3161, et. seq. 19

1 J. Wigmore, *Evidence,* § 217 at 718919 (3d. ed., 1940) 6

2 C. Wright, *Federal Practice and Procedure,* Criminal § 410, at p. 125, note 75 6

IN THE SUPREME COURT OF THE UNITED STATES

NO.

OVIDIO OMAR URDIALES,
Petitioner

versus

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, OVIDIO OMAR URDIALES, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 24, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was entered on November 24, 1975 and is reported in 523 F.2d 1245. A copy of the opinion of the Court of Appeals is set out in the Appendix A hereto. A timely filed Petition for Rehearing was denied on February 22, 1976 and this Petition for Writ of Certiorari was filed within thirty (30) days of that date. A copy of the order denying the Petition for Rehearing is set out in the Appendix B hereto.

No written opinion was entered by the District Court for the Western District of Texas.

JURISDICTION

This Court's jurisdiction is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. Whether a prior criminal act was properly admitted for the purpose of proving Petitioner's criminal intent.

2. Whether fundamental error resulted from the trial court's permitting the government to violate a written pre-trial agreement.

STATUTES INVOLVED

21 USC § 846, "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy; "21 USC § 841 (a) (1), "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." and 18 USC §2(a), "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

STATEMENT OF THE CASE

Evidence of Prior Act

Two sales of heroin were made the basis of the criminal

prosecution in this case (R. 1-5).* Both sales occurred at or near the Continental USA Club, a nightclub owned by Petitioner, OVIDIO OMAR URDIALES. The sales were made during regular business hours to undercover officers by Billy Frank Alexander, a co-defendant who later entered a plea of guilty. Billy Frank Alexander entered a plea of guilty to one count of the indictment but testified as a witness for the defense during Petitioner's trial. Billy Frank Alexander admitted making the sales but denied that Petitioner, OVIDIO OMAR URDIALES, and the other co-defendant, Martin Castilleja Vega, were in any way involved in the two transactions (R. 252, 277-278). The evidence against Petitioner and the co-defendant, Martin Castilleja Vega, was essentially circumstantial.

Jurisdiction of the United States District Court was properly invoked because the indictment returned against Petitioner charged violations of laws of the United States of America, namely: 21 USC § 846, 21 USC § 841(a) (1), and 18 USC § 2(a).

The Petitioner testified as a witness in his own behalf and denied any involvement in the heroin sales. The government, over strenuous objection of Petitioner's trial counsel, cross-examined Petitioner regarding a delivery of heroin that occurred in 1969, approximately five years before the transactions that were the basis of this prosecution (R. 351). The 1969 transaction resulted in charges being filed against Petitioner but the charges were never prosecuted and were later dismissed (R. 388).

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* References to the Record pertain to the Deferred Appendix filed in the Court of Appeals.

Petitioner was found guilty by the jury of each of the three counts of the indictment (R. 457). Martin Castilleja Vega was acquitted by the jury (R. 457). Petitioner was sentenced by the court to serve a term of ten years on the first count, seven years on the second count and seven years on the third count, such terms to run consecutively for a total of twenty-four (24) years confinement (R. 469). Billy Frank Alexander had not been sentenced on his plea of guilty at the time of Petitioner's trial but was later assessed a term of eight years (R. 482).

Omnibus Agreement

Petitioner, acting through his trial counsel, and the United States Attorney executed a pre-trial agreement in accordance with accepted practices and procedures of the Western District of Texas. The government in the pre-trial agreement assured Petitioner that the government would not rely on prior acts or convictions of a similar nature as proof of knowledge or intent (R. 7). The agreement, after its execution, was approved by the United States District Judge who later acted as the trial judge during Petitioner's trial and was made an order of the court (R. 14). The trial court, therefore, was aware that the government had assured Petitioner in the agreement that prior acts would not be introduced for the purpose of establishing intent. The evidence later introduced during the trial concerning Petitioner's prior criminal act was in direct violation of the pre-trial agreement. Petitioner's trial counsel was not notified of the government's intention to introduce prior act evidence until the jury had been impaneled and sworn and the trial was in progress (R. 196). The government made no effort during the trial to justify its violation of the pre-trial agreement nor was any attempt made to show that the violation of the

agreement would not result in harm to the defendant.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals in this case is in conflict with decisions of other courts of appeals on the same question and such conflict presents an important question of federal law which should be settled by this Court.

This Court has long held that evidence of extraneous offenses is collateral to the basic issue to be tried and therefore generally inadmissible. *Boyd vs. United States* (1892), 142 U.S. 450, 12 S.Ct. 292, 35 L.Ed. 1077. It is universally recognized that evidence concerning a defendant's prior bad conduct is not admissible to show that the accused is generally of a bad character or has a criminal disposition. As noted in *Boyd*, supra, at page 1080:

> "However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

The reason for the general exclusionary rule was further explained by this Court in *Michelson vs. United States,* 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168, where the Court states that such evidence is excluded not because it might not be persuasive but because it might weigh too heavily with the jury so as to cause the jury to pre-judge one with a bad general reputation, thus denying him a fair opportunity to defend against a particular charge.

All circuits recognize the general exclusionary rule but a

BLEED THROUGH

great deal of difficulty has been encountered in its proper application. There have developed several well-known exceptions to the general rule of exclusion, the two most generally recognized of which are not involved in this case. These exceptions permit the admission of prior convictions to impeach a witness's credibility and the admission of prior bad conduct to counter good character evidence first introduced by the defendant. The law is reasonably consistent in all jurisdictions, insofar as these two exceptions are concerned. The courts, however, have permitted the development of a number of other exceptions to the general exclusionary rule and the proper application of these exceptions threatens to overwhelm the general rule of exclusion pronounced by this Court.

Several of the many exceptions have been categorized by Professor Wigmore and include capacity, habit or custom, design or plan, knowledge or belief, intent, motive and identification. 1 J. Wigmore, *Evidence,* § 217 at 718-19 (3d. ed., 1940). The exceptions have become so numerous that Professor Charles Alan Wright has stated:

> ". . . the attitude of prosecuting attorneys may well be like that of the man who was asked what he thought of Prohibition and replied: 'It sure beats not drinking at all.' " 2 C. Wright, *Federal Practice and Procedure,* Criminal § 410, at p.125, note 75.

The categorization suggested by Professor Wigmore tends to produce a mechanical jurisprudence with the evidence admitted if it can fit within any of the recognized exceptions. Dean McCormick has criticized this approach, stating that it merely constitutes "pigeon-holing" and advocates instead a balancing test where the actual need of the other-crime evidence is balanced against the potential for

undue prejudice to the defendant. McCormick, *Evidence*, 1954, p. 332.

The courts of appeals have adopted several different approaches in determining the admissibility of extraneous offense evidence:

1. Some circuits have adopted a "relevancy" test by which evidence will be admitted if it is considered relevant to prove any issue before the court.

United States vs. Papadakis (2nd Cir., 1975) 510 F.2d 287.

United States vs. Grammer (9th Cir.,1975) 513 F.2d 673.

2. Other circuits have adopted the "categorization" approach adopted by Professor Wigmore. If such evidence will tend to come within any of the recognized exceptions such as design or plan, knowledge or belief, identification, etc., the evidence will be admitted.

United States vs. Wiggins (C.A.D.C.,1975) 509 F.2d 454.

United States vs. Freeman (10th Cir.,1975) 514 F.2d 1184.

United States vs. Flick (7th Cir.,1975) 516 F.2d 489.

United States vs. Chrzanowski (3rd Cir.,1974) 502 F. 2d 573.

United States vs. Franks (6th Cir.,1975) 511 F.2d 25.

United States vs. Cole (4th Cir.,1974) 491 F.2d 1276.

BLEED THROUGH

3. Several circuits have adopted the "categorization" approach of Professor Wigmore but recognize, as advocated by Dean McCormick, that the need of the prosecution for such evidence must be balanced against the potential for harm to the defendant.

Cunha vs. Brewer (8th Cir., 1975) 511 F.2d 894.

United States vs. San Martin (5th Cir., 1974) 505 F. 2d 918.

United States vs. Eatherton (1st Cir., 1975) 519 F.2d 603.

In analyzing the approaches of the various circuits, it will be found that there is an obvious lack of unanimity not only between circuits but between different panels within the same circuit.

The difficulties encountered in applying these traditional tests have been considered in several recent decisions. These decisions note that one or more of the categories that have been recognized as exceptions are present in virtually every case. They realize that it would be rare that knowledge, intent, motive, identification, design or plan would not be at least a formal issue in virtually every criminal trial and that to permit a mechanical application of these exceptions would result in the general exclusionary rules being overwhelmed. Accordingly, these courts have announced an additional test which must be met before evidence of extraneous offenses can be admitted. This test requires that before such evidence be admitted, it not only be relevant, be a recognized exception to the exclusionary rule, and on balance, be not unduly prejudicial to the defendant, but, in addition, further requires that the issue constituting the exception be

materially disputed during the trial.

United States vs. Ring (6th Cir., 1975) 513 F.2d 1001; *United States vs. Goodwin* (5th Cir., 1974) 492 F.2d 1141; and *United States vs. Fierson* (7th Cir., 1969) 419 F.2d 1020 are examples of such cases.

Of the many exceptions noted, the most difficulty seems to have been encountered by the courts in determining the admissibility of evidence concerning prior criminal acts for the purpose of establishing a defendant's intent. This difficulty is caused by the fact that intent is at least a formal issue in almost every criminal trial. There are very few trials in which the intent of the defendant to violate the law is not at least a formal issue in the sense that the defendant must have knowingly violated the law. As a result the courts have tended to permit the introduction of extraneous-crime evidence so long as intent is an element of the offense charged. The courts, in doing so, have failed to recognize that while intent may be a formal issue, there will in many cases be no real dispute as to the defendant's intent.

Each of the cases cited immediately above have reversed convictions because evidence of extraneous crimes was admitted to prove a defendant's intent when the defendant's intent was never made a materially disputed issue during the trial. In each of these cases, the crime was such that if the jury believed from the evidence introduced by the prosecution that the defendant committed the acts with which he was charged, the jury would necessarily have found the defendant did so with the intent to violate the law. The only disputed question was, therefore, whether the defendant had, in fact, committed the acts charged.

BLEED THROUGH

In *Fierson*, supra, the defendant was charged with repossessing an automobile, claiming that he was an FBI agent. The defendant admitted that he repossessed the automobile but denied stating he was an FBI agent. In *Goodwin*, supra, the defendant was charged with importing approximately 1,000 pounds of marijuana. Goodwin's defense was that he was not the same John Goodwin that the government had implicated in the conspiracy. In *Ring*, supra, the defendant was charged with mailing threatening letters. Ring did not contend that the letters were mailed by mistake or accident; nor did he assert any other defense that would show an innocent state of mind.

The problem is most sharply focused in *United States vs. Ring*, supra. The government in *Ring* attempted to justify the admission of evidence that the defendant had previously made threats to another person. The government argued that since intent was an element of the offense with which the defendant was charged, this in itself would be sufficient to permit the admission of evidence of the previous threats to show the defendant's intent in the case for which he was being tried. This contention was specifically rejected. The Court stated at page 1003:

> "Although intent is an element of the offense charged in the indictment, intent was not a genuinely contested issue in the case because Appellant had not asserted mistake or an innocent state of mind as a defense."

The court stated that the jury must necessarily infer the requisite criminal intent from the very nature of the crime charged. Therefore, if the jury believed that Ring had, in fact, mailed the threatening letter, there would have been no question as to his intent in doing so unless the defendant

made his intent a disputed issue by admitting the drafting of the letter but contending that it was mailed through mistake or accident. The court reviewed historical problems involving prior act evidence at some length and after doing so, stated that most of the difficulties were caused by the fact that, in reality, two separate classes of cases were involved: 1) those cases where criminal intent cannot be readily inferred from proof of the criminal act charged and 2) those cases whereby proof of the commission of the acts alone would cause the jury to necessarily infer criminal intent.

The court notes that examples of the first category of cases would include passing counterfeit money, forgery, receiving stolen property, fraud and obtaining money under false pretenses. In each of these cases the commission of the acts charged would not necessarily establish the requisite criminal intent because a person may possess counterfeit money or stolen property without the knowledge that such money is counterfeit or property stolen, and therefore not intend to violate the law. In such cases, proof that the defendant had previously passed counterfeit money or possessed stolen property would tend to establish that the defendant had knowledge that the money he circulated on the subsequent occasion was counterfeit or that the property possessed was stolen. Such evidence would therefore be important in establishing the defendant's criminal intent.

In the second category of cases, intent might be a formal issue but proof of the commission of the crime would necessarily lead to the conclusion that the acts were committed with criminal intent. The court noted that mailing threatening letters would obviously fall under this second category.

The government in *Ring* further relied on the "rele-

BLEED THROUGH

vancy" and "balancing" tests but these tests were specifically rejected by the court as being inapplicable. The court realized that such tests may be valid but rejected their application since intent was not a dispputed issue during the trial.

A review of the evidence in this case makes it apparent that the crime with which Petitioner was charged would necessarily fall under the second category considered by the court in *Ring*, supra. Petitioner was charged with making two sales of heroin. During the trial Petitioner did not assert an innocent state of mind; he did not contend that he was entrapped, that he acted as an accommodating agent, that the sales occurred as a result of accident or mistake; nor did he assert any other defense that would have placed his intent in issue. His sole defense was that he did not in any way participate in the heroin sales (R. 332-333). The trial court, over objection, admitted evidence that Petitioner had been involved five years previously in a narcotics transaction (R. 350-351). This evidence was admitted for the stated purpose of proving Petitioner's intent in the case on trial (R. 202). It is inconceivable that the jury, if it believed that Petitioner had sold the heroin, would not infer from that fact alone the requisite intent to violate the law. The government, therefore, had no need to introduce evidence of the prior act.

Petitioner contended in the Court of Appeals that his intent could not have been placed in issue merely by his entering a plea of not guilty and denying the commission of the offense. The Court of Appeals, however, upheld the admission of the prior act evidence. The Court of Appeals attempts to distinguish *Ring*, supra, because in *Ring* the evidence of the prior offense was introduced in the government's case in chief while "***the defendant here had taken

the stand, admitted his presence at the scene of the transaction, but generally denied his involvement" (A-3). The court stated, "This denial carried with it a denial of intent to be involved" (A-3-4). This distinction is difficult to understand because any time a defendant enters a plea of not guilty and denies that he was involved in the commission of the acts that would constitute the offense charged, he would necessarily deny his intent to be involved. To carry the court's reasoning to its natural conclusion would mean that any time a defendant enters a plea of not guilty and testifies denying the commission of an offense, he makes his intent a disputed issue in the trial. In so holding, the Court of Appeals has totally failed to realize the distinction between the two separate classes of cases discussed in *Ring*.

In the first category of cases, proof that the defendant committed the acts charged would not alone necessarily establish that the defendant committed the acts with intent to violate the law. In this category, the government has a strong need of additional evidence to prove the defendant's intent and in such instances proof of extraneous crimes tending to establish the defendant's intent is properly admissible. Such evidence, furthermore, would be admissible in the government's case in chief since it would be needed to establish a prima facie case.

In the second category of cases, however, proof of the acts constituting the offense would itself establish the requisite intent, thereby eliminating any need for the prosecution to introduce other evidence to establish the defendant's intent. In such cases, evidence of extraneous crimes would not be admissible in the government's case in chief and would become admissible only in the event the defendant himself made his intent a disputed issue by asserting that the commission of the acts charged was done through accident or mis-

BLEED THROUGH

take or otherwise asserting a justification for his actions, such as entrapment or accommodating agent. In each of these instances, however, the defendant would necessarily have admitted committing the acts charged but would deny that his actions were taken with intent to violate the law.

The dangers inherent in the reasoning adopted by the Court of Appeals in this case should be readily apparent. It must be remembered that it is not convictions for past crimes that we are considering but the admission of evidence concerning prior acts alleged to have been committed by a defendant in which no conviction resulted. Under such circumstances, to permit the introduction of evidence of prior misconduct to prove an issue that is not disputed fulfills no meaningful purpose for the prosecution but forces a defendant to elect between exercising his constitutional right to testify as a witness in his own behalf or be faced with a recitation of all his alleged past misconduct. The evidence admitted against Petitioner in this case involves a single isolated transaction that occurred five years previous to his trial and which did not result in a conviction. Other courts have gone so far as to permit the introduction of evidence of a prior criminal charge of which the defendant had been tried and acquitted. *United States vs. Moore* (9th Cir., 1975), 522 F.2d 1068.

The problems discussed herein are not unique to Petitioner's case but will continue to plague the courts of appeals unless resolved by this Court. The question of the proper admission of evidence of extraneous offenses as an exception to the general exclusionary rule is in all probability the single evidentiary issue most often discussed by the various courts of appeals. It is respectfully submitted that the adoption by this Court of the rationale in *Ring* will aid the courts of appeals by furnishing objective criteria against which the

propriety of admitting extraneous offense evidence can be measured.

II.

The action of the Court of Appeals in sanctioning the government's violation of a pre-trial agreement represents such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The United States District Court for the Western District of Texas pioneered the implementation of pre-trial discovery procedures in criminal cases as recommended by a subcommittee of the American Bar Association. The pre-trial discovery proceedings, commonly referred to as "Omnibus Proceedings," are designed to promote an expeditious and fair determination of the charges in criminal proceedings; to provide the accused with sufficient information to make an informed plea; to permit thorough preparation for trial and minimize surprise at trial; and to reduce interruptions and complications of trials by identifying and determining prior to trial issues collateral to guilt or innocence. The Omnibus procedures are strongly emphasized by the various judges in the Western District of Texas and have been widely accepted by counsel for both the government and defense.

The Omnibus procedure was utilized in this case. The pre-trial agreement was signed by Petitioner, his counsel, the assistant United States attorney acting as prosecutor, and was reviewed, approved and made the order of the United States District Judge who later acted as the trial judge in this case (R. 5-14). In the agreement, Petitioner waived formal proof of several issues that would normally be required to be proven by the government. In the agreement, among other things,

BLEED THROUGH

Petitioner agreed not to assert any claim of incompetence; not to rely on any defense of insanity, not to rely on alibi; agreed to accept a chemist's report in lieu of testimony; and stipulated that there had been a continuous chain of custody of government agents from the time of seizure of the contraband to the time of trial (R. 10-11, 13). Petitioner further disclosed to the government the nature of the defenses that would be asserted by him (R. 11). The disclosures, stipulations and agreement made by the Petitioner materially assisted the prosecution and significantly reduced the complexities of the trial.

The government in the Omnibus agreement also made several disclosures concerning the nature of the proof that would be introduced against Petitioner (R. 9). Among other representations made by the government was an agreement not to introduce evidence of prior acts for the purpose of establishing knowledge or intent (R. 7). Petitioner and his counsel were entitled to rely upon the Omnibus agreement and presumed at the time of trial that proof of prior acts would not be introduced.

A review of the record in this case will establish conclusively that the government intended from the very commencement of the trial to introduce testimony concerning an alleged prior offense in direct violation of the Omnibus agreement. The government subpoenaed a police officer for the sole purpose of giving testimony concerning the prior act (R-380). During the trial the assistant United States attorney acting as prosecutor admitted to the trial judge that this witness was available to testify in the event that Petitioner denied on cross-examination his involvement in the previous transaction (R. 380). Petitioner, however, when asked about the transaction, admitted his involvement. This cross-exami-

nation alone constituted a violation of the pre-trial agreement and the violation was further compounded by the fact that the police officer was later called and questioned about the previous transaction (R. 381).

The admission of evidence of the prior offense in violation of the pre-trial agreement was strongly challenged by Petitioner in the Court of Appeals. The only previous decision specifically involving a violation by the government of a pre-trial Omnibus agreement is an earlier opinion of the Court of Appeals for the Fifth Circuit in *United States vs. Scanland* (5th Cir., 1974) 495F.2d 1104. In *Scanland* the government disclosed its intention to introduce evidence contrary to the pre-trial agreement at an en camera hearing held after the jury had been chosen but before the trial commenced. The Court of Appeals reversed the conviction, stating that the district court advanced no substantial reason for releasing the government from its agreement and that the admission of evidence of the prior transaction in violation of the Omnibus agreement was reversible error unless it could be said that the violation was harmless beyond a reasonable doubt.

The Court of Appeals declined to consider the violation of the Omnibus agreement in this case, stating as the reason therefor that Petitioner's trial counsel had failed to specifically assert the violation before the trial court. The Court held that such failure precluded a review of the trial court's decision on appeal. The Court of Appeals further stated that if the violation had been strongly objected to at the time of trial, the trial court could have taken other measures to protect the government's evidentiary rights and Petitioner's problem of surprise and could have eliminated the necessity of a retrial.

BLEED THROUGH

The distinction made by the Court of Appeals is extremely tenuous for several reasons:

1. A review of the record makes it apparent that Petitioner's trial counsel did object to the introduction of evidence of the prior act in violation of the Omnibus agreement (R. 350). The objection is perhaps not as specific as might be desired but is as specific as the objection lodged in *Scanland.*

2. It is only the Court of Appeals that has raised the question of sufficiency of the objection. The government itself at no time took the position before the Court of Appeals that no objection was made.

3. The trial judge participated in the Omnibus procedure. The pre-trial negotiations were held under his supervision and direction. The Omnibus agreement was reviewed and approved by the court after its execution and was made an order of the court (R. 14). The trial judge, therefore, was aware of the content of the Omnibus agreement and it is difficult to understand why an objection to its violation would be necessary.

4. In this case, as compared with *Scanland*, the jury had been selected, impaneled and sworn and the trial had commenced before Petitioner and his counsel were advised of the government's intention to violate the agreement (R. 196). Under such circumstances, jeopardy had attached. It is difficult to ascertain what measures the trial court could have taken to protect the government's evidentiary rights without sanctioning a direct violation of the pre-trial agreement. The admission of the evidence certainly came as a surprise to

Petitioner and his counsel and it is inconceivable that the admission of such evidence was harmless beyond a reasonable doubt.

5. The rationale of the Court of Appeals in this case has placed the penalty for violating the agreement not upon the government where it rightly belongs but upon Petitioner who is the party wronged by the government's violation of the agreement. Under such circumstances, to allow Petitioner's conviction to stand is to knowingly permit the government to benefit from its own wrong-doing.

To permit the decision of the Court of Appeals to stand in this case will significantly impair efforts by the courts to expedite the administration of criminal justice. Congress, by passage of the *Speedy Trial Act of 1974*, 18 USC § 3161, et. seq., has issued its mandate to trial courts to expedite the preparation and trial of criminal cases. The Omnibus procedure adopted by the Western District of Texas and similar procedures designed to simplify the issues to be determined during trial are the tools most readily available to meet this mandate. If, however, the courts do not demand strict adherence to pre-trial agreements made in good faith in accordance with such procedures, their use will fall into disrepute because counsel, whether prosecution or defense, will, with justification, feel that such agreements cannot be relied upon.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BLEED THROUGH

RICHARD W. HARRIS
1517 Tower Life Building
San Antonio, Texas 78205

OSCAR C. GONZALEZ
200 Main Plaza
San Antonio, Texas 78205

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari have been served on opposing counsel, this 17th day of March, 1976.

Richard W. Harris

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ovidio Omar URDIALES,
Defendant-Appellant

No. 75 - 1289

November 24, 1975

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, Chief Judge, and TUTTLE and RONEY, Circuit Judges.

RONEY, Circuit Judge:

Defendant Ovidio Omar Urdiales, convicted on three narcotics counts under 21 U.S.C.A. §§ 841(a)(1) and 846 and 18 U.S.C.A. § 2, asserts the following errors on appeal: admission of prior offense evidence; admission of a co-conspirator's out-of-court hearsay statements; failure to acquit on insufficiency of evidence; admission of evidence produced by an alleged illegal search of defendant's automobile; failure to grant a mistrial because of the improper prejudicial testimony and questioning of Government witnesses; and improper charge to the jury as to an accomplice's testimony. We affirm.

BLEED THROUGH

The crimes charged were conspiracy and aiding and abetting a co-defendant's unlawful distribution of 22.7 and 245.09 grams of heroin. The two transactions occurred within a few days of each other at a club owned by defendant. The purchases were made by a Government agent from the co-defendant, an employee at defendant's club, who had pled guilty prior to trial.

Prior 1969 Heroin Offense

The most troublesome point on appeal concerns the introduction into evidence during defendant's cross-examination by the Government of a 1969 narcotics transaction. No conviction had been obtained as a result of this prior transaction, the charges having been dismissed upon completion of the defendant's agreement to cooperate with the Government in obtaining the conviction of a prime target. The defendant contends his involvement with heroin in 1969 was improperly admitted to prove intent for two reasons: *first*, intent, although a material element of the crime charged, was not a genuine issue in the case, and *second*, the use of the prior transaction to prove intent violated the terms of a pretrial omnibus agreement.

[1] The defendant concedes that, contrary to the general rule prohibiting evidence of separate criminal transactions, use of other offenses is permitted for the purpose of establishing intent. Relying on cases such as *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975), however, he contends that other offenses are admissible under this exception only when intent is a genuinely contested issue in the case.

[2,3] A series of Fifth Circuit cases has developed the law concerning the "intent" exception to the general rule.

E.g., *United States v. San Martin*, 505 F.2d 918 (5th Cir. 1974); *United States v. Goodwin*, 492 F.2d 1141 (5th Cir. 1974); *United States v. Martinez*, 466 F.2d 679 (5th Cir. 1972); *reh. denied*, 481 F.2d 896 (5th Cir.), *cert. denied*, 414 U.S. 1065, 94 S.Ct. 571, 38 L.Ed.2d 469 (1973); *Matthews v. United States*, 407 F.2d 1371 (5th Cir. 1969), *cert. denied*, 398 U.S. 968, 90 S.Ct. 2177, 26 L.Ed.2d 554 (1970); *Baker v. United States*, 227 F.2d 376 (5th Cir. 1955); *Weiss v. United States*, 122 F.2d 675 (5th Cir.), *cert. denied*, 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550 (1941). Synopitally, the prerequisites needed for application of the exception are fourfold: (1) plain, clear and convincing evidence of a prior similar offense,(2) not too remote in time, (3) in which intent is a material element, and (4) the proof of which is substantially needed by the Government to the extent that material prejudice to the defendant is outweighed. The prior offense introduced in this case, substantially similar to the offenses for which defendant was on trial, satisfies these requirements and was properly held admissible. *See,* in addition to those cases cited previously, *United States v. Simmons*, 503 F.2d 831 (5th Cir. 1974); *United States v. Cavallino*, 498 F.2d 1200 (5th Cir. 1974); *United States v. Arias-Diaz*, 497 F.2d 165 (5th Cir. 1974); *United States v. Fonseca*, 490 F.2d 464 (5th Cir.), *cert. denied*, 419 U.S. 1072, 95 S.Ct. 660, 42 L.Ed. 2d 668 (1974).

We need not rule here on whether a plea of "not guilty" would put intent sufficiently in issue to support admission of the evidence in the Government's case in chief. Unlike the Sixth Circuit's decision in *United States v. Ring, supra,* and cases cited therein, where the prior offenses were proved in the Government's case in chief, the defendant here had taken the stand, admitted his presence at the scene of the transaction, but generally denied his involvement. This denial

BLEED THROUGH

carried with it a denial of intent to be involved. No cases cited support defendant's contention that the kind of defense asserted in this case removed intent as a material issue to the point where the prior transaction "intent" exception should not apply.

[4] On objection to the admission of the evidence in the trial court, the defendant did not assert a violation of the pretrial omnibus agreement, a point he vigorously argues on appeal. We believe that this is the kind of argument that must be specifically asserted before the trial court to be reviewable on appeal. *See* F.R. Crim. P.51; *cf. United States v. Anderson,* 471 F.2d 201, 203 (5th Cir. 1973). Even assuming the defendant's interpretation of the omnibus agreement would have been upheld by the district court if asserted at trial, other measures could then have been taken to protect both the Government's evidentiary rights and the defendant's problem of surprise and could have eliminated the necessity of a retrial. *See generally* 3 Wright, *Federal Practice & procedure (Criminal)* § 842 (1969). Under such circumstances, we find no reversible error in the admission of the evidence and no cause to consider the application of *United States v. Scanland,* 495 F.2d 1104 (5th Cir. 1974).

Co-Conspirator's Hearsay

[5,6] Hearsay statements made to a Government agent by a co-conspirator are properly admissible if the prosecution proves the conspiracy's existence by independent evidence. *Glasser v. United States,* 315 U.S. 60, 74, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Oliva,* 497 F.2d 130, 132-133 (5th Cir. 1974). We believe the evidence in this case was sufficient to show existence of the conspiracy independent of the hearsay statements. The Government agent had questioned defendant moments before the first

heroin transaction as to whether everything was ready. Urdiales replied that "everything is ready, go in and talk to Alex." Defendant was present at the club during the entire transaction, and even gestured in an affirmative manner in response to the agent's visual inquiries when the heroin pickup was made. During the second transaction defendant's actions in reference to the co-conspirator's concomitant movements in and out of the club, and the discovery of the money beneath the floor mat of the defendant's car, further support the conspiracy's existence apart from the implicating remarks.

Sufficiency of the Evidence

[7] A review of the record reveals that the evidence, though circumstantial, was sufficient when viewed in the light most favorable to the jury verdict to support a finding beyond a reasonable doubt that a conspiracy did exist. *See Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457 (1942).

Automobile Search

[8] Defendant contests the admission into evidence of $3,000 found by a Government agent who noticed through the car window a distinctive bulge under the floor mat of defendant's car. The evidence withstands the illegal search challenge under the principles of *Chambers v. Maroney,* 399 U.S. 42, 46-52, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). *Cf. Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Although the car was not being driven, it was in the process of being towed away. Immediate action by the officer was justified. The agent had seen the defendant with the car on a prior occasion. The automobile, found in a parking lot behind a bus station had earlier in the

BLEED THROUGH

day been parked across from the club owned by Urdiales, the scene of the two transactions. Although no agent saw defendant move the car, it had indisputably been moved between the time the defendant had entered and left the club until he was arrested inside the bus station, a period of only a few minutes. The agent testified that he knew of the missing $3,000 even before the car was searched. Under these exigent circumstances, there is no merit to defendant's contention that a search warrant should have been obtained.

Jury Charge

The judge charged that:
An alleged accomplice does not become incompetent as a witness merely because of participation with others in the criminal act charged. However, the jury should keep in mind that the testimony of an alleged accomplice, if you decide he was an accomplice, should be closely examined, received with caution and weighed with great care.

[9] The accomplice had testified, contrary to his earlier hearsay statements, that defendant played no role in the drug deals. This Court in *United States v. Nolte,* 440 F.2d 1124, 1126 (5th Cir.), *cert. denied,* 404 U.S. 862, 92 S.Ct. 49, 30 L.Ed.2d 106 (1971), stamped its imprimatur on a similar jury charge where an accomplice had exculpatorily testified for the defense. The Supreme Court in *Cool v. United States,* 409 U.S. 100, 103, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972), cited *Nolte* with approval. The instant case does not concern a charge which predicated the jury's acceptance of the testimony on finding it true beyond a reasonable doubt, as in *Cool.* Here the charge concerned only the weight to be accorded the evidence, a practice recognized as proper by *Cool.*

Harmless Error

[10] The testimony received from a Government agent concerning defendant's reputation in heroin traffic and the prosecutor's reference to defendant's attempt at bargaining with the Government after "the case was made," did not constitute reversible error under the circumstances of this case. At best, they only rise to the level of harmless error. *See* F.R. Crim. P. 52(a).

Affirmed.

BLEED THROUGH

APPENDIX B

ORDER DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75 - 1289

U.S. Court of Appeals
FILED
Feb 23, 1976
Edward W. Wadsworth, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

OVIDIO OMAR URDIALES,
Defendant-Appellant

Appeal from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Nov. 24, 1975, 5 Cir., 1975, F.2d)

(FEBRUARY 23, 1976)

Before BROWN, Chief Judge, TUTTLE and RONEY, Circuit Judges.

PER CURIAM:

[x] The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.